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## THE BOUNDARY QUESTION.

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### PART I.

By the Treaty of Paris in 1763, France ceded to Great Britain, Canada and all her territories in North America east of the Mississippi and north of its source. The source of the Mississippi is traced to Lake Itasca, in the State of Minnesota, in 47° 38' north latitude, nearly two degrees south of the present boundary between Great Britain and the United States, consequently since 1763 from the Atlantic to the Rocky Mountains, within the confines of the Canada of to-day, the supreme power has been that of Great Britain, and the only territorial rights founded on title other than the constitutions granted to the Provinces, were those which had previously been conferred on the Hudson's Bay Company by the Charter of Charles II in 1670.

Canada, or *Nouvelle France*, (for they may be said to have been identical,) included extensive territories which were undefined both towards the north and west. The French limits on the north were nearly always in dispute with Great Britain and the Hudson's Bay Company prior to the cession of 1763.

In October, 1763, the British Crown, out of these ceded territories, by a Royal Proclamation established the first Province of Quebec, which was included within very nearly the same territorial limits as that Province holds to-day.

But in 1774 the British Parliament passed the Quebec Act, which added largely to the existing Province, taking in what afterwards became Upper Canada in the west; and all those extensive territories south of Lakes Huron, Michigan and Superior, then part of the British possessions and now forming the States of Ohio, Indiana, Illinois, Michigan and Wisconsin, which were "during His Majesty's pleasure annexed to and made part of the Province of Quebec," with a form of civil government and with defined boundaries towards the south and west, and abutting towards the north on the territory of the Hudson's Bay Company.

The war of American Independence lost to England all her possessions south of the great lakes, and the southern boundary of the Province of Quebec became therefore changed to the international boundary between Great Britain and the United States, by the Treaty of 1783. The boundaries declared by the Quebec Act have not been otherwise altered, and in ascertaining the western boundary of the Province we must still go south to where by that Act the western boundary was made to commence, which was the point of junction of the Ohio and Mississippi rivers.

In 1791 another Act was passed by the Imperial Parliament called the Constitutional Act, which provided for the division of the Province and established a separate constitution for Upper and Lower Canada, when they should be divided according to a line of division to be settled by His Majesty in Council.

By a Proclamation made at Quebec, on the 18th November, 1791, by General Alured Clarke, then Lieutenant Governor, the division line was recited as follows (shortly) commencing at a stone boundary on Lake St. Francis, &c., &c., thence to the Ottawa River and ascending the said river into Lake Temiscaming and thence on a line due north, until it strikes the boundary line of Hudson's Bay (including all the territory to the westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada\*). No boundary was defined by the Act itself.

\*The clause in the parenthesis has an important bearing on the case. It is alleged to have been unauthorized and is in conflict with other authority to be referred to hereafter.

The following events may be enumerated in their order:—

The Union of Upper and Lower Canada in 1840.

The Confederation Act of B. N. A., 1867.

The Rupert's Land Act of 1868, by virtue of which the title was acquired by the Dominion to all the Hudson's Bay Company's territories.

The Province of Ontario as successor to the Province of Upper Canada, claimed that she was entitled to a portion of these territories, and that her boundaries should be adjusted accordingly. This claim having been resisted by the Dominion, was referred to arbitration by the two Executive Governments, and an award was made by the arbitrators, Sir Edward Thornton, Sir Francis Hincks, and Chief Justice Harrison, in August, 1878, which assigned boundaries to the Province that included a large portion of the disputed territory.

A Select Committee of the House of Commons having investigated the subject during the Session of 1880, reported that in their opinion the award had not described the true boundaries of the Province of Ontario.

With these preliminary remarks we now proceed.

The boundary on the west, as defined by the Quebec Act (1774,) which gave the only statutory definition of the boundaries of the Province of Quebec, as subsequently divided by the Constitutional Act of 1791, into Upper and Lower Canada, and again reunited into Canada by the Union Act of 1840, is a line drawn from the junction of the Ohio and Mississippi rivers "northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay." The true rule of construction of an Act of Parliament, according to Chief Justice Tindall, is that it is the duty of the Courts to confine the enquiry to the words of the Legislature, nothing adding, nothing diminishing, and that no conditions or qualifications which are not found there shall be imported into an Act of Parliament. We have familiarized this rule by the more homely and perhaps more expressive way of putting it, thus: an Act of Parliament must be read within its own four corners. The only permissible exception to the rule is when the language is so ambiguous that it cannot be clearly interpreted by itself, in which case extrinsic evidence may be admitted to prove the intention of the Legislature, but it is contended that in this statute the language is sufficiently plain. The whole difficulty in this boundary turns on the meaning of *northward*, and experts were called before the Committee to explain the meaning of this word in its exact as well as popular sense. Col. Dennis, Surveyor-General Russell and others said that this word as used in the Statute can only have one meaning, and that is *due north*, and that no other interpretation can be given to it, for if we are asked to deviate from the true north there would be equal reason for a deviation to the east as to the west and so *vice versa*, and that, therefore, by exhaustive process, *northward* taken by itself, that is without any condition or qualification, can mean nothing else than *north*.

The point of junction of the Ohio and the Mississippi is about 600 miles south of Lake Superior, and a line drawn due north from the junction would pass near Fort William, and so follow on till it reaches the southern boundary of the Merchants Adventurers or Hudson's Bay Co.'s territory, said to be the height of land to the north of Lake Nipigon. This is the line claimed by the Dominion to be the true line in accordance with the Quebec Act of 1774. The award of the arbitrators has established a stone monument at the north-west angle of the Lake of the Woods and a line drawn due north from that point to English River as the extreme western boundary of Ontario. The monument at the Lake of the Woods was placed to mark a governing point on the boundary between the United States and Great Britain some years ago, and has no significance in respect of the present dispute further than its having been now adopted as a governing point by the award. This awarded line is some 350 miles to the west of the Dominion line, and, if prolonged southward into the State of Minnesota it would strike very near to the source of the Mississippi. Ontario claimed far west of even that line; indeed, her claim extended to the base of the Rocky Mountains, but she seems now disposed to rest upon the award, and we may, therefore, treat her claim as being limited to the awarded boundaries. We shall confine our present remarks to the western boundary in order to avoid confusion.

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The argument on the part of the Government of Ontario, in support of their case, is briefly this:—But in the first place it should be understood that both parties are agreed up to the junction of the two rivers. The southern boundary of Canada, according to the Quebec Act of 1774, commenced at the Bay of Chaleurs, thence westerly to Lake Erie, thence to the Ohio River, thence along the Ohio until it joined the Mississippi. The Dominion and Ontario part at that point; the former starts due north because she says that is the boundary according to the Statute. But the Ontario Government say—to continue their argument—that it was the intention of the British Parliament, when it passed the Quebec Act, that the boundary should follow the banks of the Mississippi to its source, that being northward, although far from due north; that a due north course would have deprived a number of French settlements in Illinois which were located between where that line would have run and the river (which runs from the north-west) of the benefits of civil government which was, they allege, the main object of the enlargement of the Province, and they point to the preamble of the Statute in support of that view; and they say that if the Statute is doubtful in its language it was within the prerogative of the Crown, independently of Parliament, to define the boundaries of its possessions (according to old prerogative law the original jurisdiction over boundaries would seem to be vested in the King in Council) and that the Crown has extended the boundaries westward in order to meet the requirements of the case by the Commission issued to Sir Guy Carleton on the 27th December, 1774, appointing him Governor General of the said Province. This Commission, after describing the southern boundary, in the same words as in the Quebec Act, to the junction of the Ohio and Mississippi, has these words in addition: "along the eastern bank of the said river"; turning to the Act, after the description of the territories and boundaries, we find this clause: "be and the same are hereby, during His Majesty's pleasure, annexed to and made part and parcel of the said Province of Quebec," it is contended that though Parliament had fixed the boundary, the clause "during His Majesty's pleasure" was intended to preserve the prerogative which the King subsequently thought proper to exercise by the issue of the said Commission, which does not, therefore, conflict with the Statute and which operates as a legal extension "along the eastern bank of the Mississippi to the southern boundary of the Hudson Bay Company's territory." But the answer is that the Statute in the deferential language of that day begins with: "May it therefore please your Most Excellent Majesty that it may be enacted, &c."\* and that the clause relied on only meant the pleasure to be exercised (if at all) by His Majesty through Parliament.

But even it be, as is contended, that there was a reservation in the Statute of the prerogative power as to boundaries, there is nothing to show that the power was ever exercised independently of Parliament, for the King's decree or edict could only have taken form and effect through an Order in Council duly published by Royal Proclamation, not as here, by the issue of a Commission to a Governor in which boundaries or other description of territories outside the Province ought in fact to have been given, so as to extend the jurisdiction over other parts of British North America included, with the same Government as was shown by the Royal Instructions which accompanied the Commission, and in which Sir Guy Carleton is styled the Governor General of Quebec and all His Majesty's territories in America dependent thereupon. He is thereby required to regulate the peltry trade in the Indian territories, and is given "power to establish courts of justice for the Province at large, or separately, for its dependencies," the word "dependencies" in the Instructions, is peculiar, and follows the French idea and form of expression, for, by the Treaty of Paris, the French King ceded to England "Canada and all its dependencies," and by a Royal Charter of his predecessor, Louis XIV., Louisiana and Illinois had been declared to be dependencies of Canada or *Nouvelle France*. Louisiana remained with France, but the Illinois country, on the east of the Mississippi, came to England as a dependency of Canada. If, then, we are to look outside the Statute and to the Commission for further light

\* It will be remem-  
bered that the King.

\* the Acts of Parliament used to be in the form of Petitions addressed to



as to its meaning, we must also look at the Royal instructions; and, reading both together as one instrument, as they should be read, it will be seen that no exercise of the prerogative was called in to extend the Statute, but that the limit of British jurisdiction, and not the limits of the Province, was what was intended.

Besides, when we consider what the Act has accomplished in bringing in large territory north and south of the lakes, and that a considerable number of French settlements in Michigan, Ohio and Illinois were, in fact, brought within the enlarged boundaries of the Province\*, and that the preamble has, in truth, been carried out by the Act as it stands, the conclusion must be, that so far, the argument has failed.

Another Act of the Crown which is strongly relied upon to establish an enlargement of Quebec co-equal with French Canada, is the Proclamation by General Clark, of the division of the Province in pursuance of the Constitutional Act of 1791. That Statute it will be remembered, provided a Constitution for the civil government of Upper and Lower Canada respectively, to take effect when the Province of Quebec should be divided by His Majesty into two separate Provinces, and that it should be lawful for His Majesty in Council to authorize the Governor or Lieutenant-Governor to fix and declare the day of the commencement of the Act within the said Provinces respectively.

On the 12th September immediately following, a Commission, under the Great Seal, was issued to Lord Dorchester, appointing him Governor General of the two new Provinces of Upper and Lower Canada, which has the following recital:—

"And whereas we have thought fit by our Order made in our Privy Council on the 19th day of August, 1791, to divide our said Province of Quebec into two separate Provinces by a line to commence at a stone boundary on the north bank of Lake St. Francis (here follows the description until it strikes the Ottawa river then) to ascend the said river into Lake Temiscamingue, and from the head of said lake by a line drawn due north until it strikes the boundary line of Hudson's Bay; the Province of Upper Canada to comprehend all such lands, territories and islands lying to the westward of the said line of division as were part of our said Province of Quebec, and the Province of Lower Canada to comprehend all such lands, territories and islands lying to the eastward of the said line of division as were part of the said Province of Quebec."

On the 18th November following, at Quebec, General Clark, the Lieutenant Governor, in the absence of Lord Dorchester, issued his Proclamation (Ont. Doc. 27) which recited that by an Order in Council in the month of August last the Province of Quebec had been divided into two distinct Provinces by separation of the same, according to the following line of division, namely, (here follows word for word the same description as in Lord Dorchester's Commission to the end of "Hudson's Bay," and then leaving out the remaining words of that description it proceeds to give these words instead): "Including all the territory to the westward and southward of the said line to the utmost extent of the country, commonly called or known by the name of Canada."†

The Proclamation further recited the Statute of last Session, and the authority thereby given to His Majesty to authorize the Governor, or in his absence the Lieutenant-Governor, to fix and declare the day of commencement of that Act, and that by another Order in Council of 24th of August a Royal Warrant had been issued commanding the Governor or Lieutenant-Governor to fix and declare the said day.

\* The following settlements may be mentioned: Detroit, Miami, Michilimackinac, St. Vienne, Green Bay, Sault St. Mary, Prairie des Chiens, Presque Isle on Lake Erie, and many others.—*De Bougainville*, French Posts, p. 80.

† In the *Canadian Debates* on the Quebec Bill, Attorney General Thurlow said: "Now the House will remember that the whole of Canada as we allowed it to extend was not included in the proclamation, that the bounds were not co-equal with it as it stood then, and that it is not included in the present Act of Parliament."

† At this date (1791) England had no territorial rights south of the International boundary established by the treaty of 1763, consequently this proclamation could have no application to the question of the Mississippi boundary which was entirely within United States territory.

There is an isolated unattached paper without beginning or ending, which is called a copy of description of the line of division agreeing with General Clarke's proclamation, to be found on page 411 of the Ont. Doc. We are there referred to p. 389, where it is represented to be a copy of a paper presented to Parliament describing the line (this statement is not verified or confirmed in any way) this, if true, would be of no consequence, for the line was established by the Order in Council of 19th August, which was after the close of the Session; Parliament had nothing to say on the subject of the line; on the contrary, the Statute expressly sanctions the establishment of the division line by the Crown.

Then followed the Proclamation fixing the 26th day of December for the commencement of the Act within the said Provinces respectively.

Given under the Great Seal of the Province of Quebec. Witness Alured Clark, Lieutenant-Governor, &c., &c.

It will have been observed that there are two Orders in Council referred to in this Proclamation: one of the month of August (the 19th according to Lord Dorchester's Commission) relating exclusively to the division line; the other of the 24th of August, relating especially to the day of the commencement of the Act. The former is nowhere given, either among the Ontario or the Dominion printed papers, and it would seem not to be forthcoming now, but there can be no doubt that the line as established by that Order of the 19th August, is correctly recited in Lord Dorchester's Commission of 12th September, which, being under the Great Seal, is the highest and most conclusive evidence that can be produced of the fact.

On the other hand, the Proclamation by General Clark (issued under the Seal of the Province) was only authoritative to the extent of the Royal Warrant which it recites, *i.e.*, the fixing and proclaiming the day of commencement of the Act. The description of the division line was an unauthorized recital, and could have no effect in the direction contended for—as an enlargement of the Province by the act of the Crown—even if it could have been so read, but we have a direct authority to the contrary, in the *De Reinhardt* case, tried at Quebec before Chief Justice Sewell and Mr. Justice Bowen in 1818, when the Court held in the clearest language that the Statute and the Proclamation together only had the effect of dividing the already defined Province of Quebec, and did in no way extend the boundaries.

This judgment was based on the assumption that General Clarke's Proclamation had truly recited the division line, and without the knowledge of the correct definition of that line as disclosed in the Commission of Lord Dorchester.

The saving clause in the Quebec Act had reference only to the continuance together of the territories thereby united; the words of the clause are "be and the same are hereby, during his Majesty's pleasure, annexed to and made part and parcel of the said Province of Quebec." The union of all those widely extending territories reaching to the Ohio or the south, whose population at that time was exclusively French—was a political experiment of doubtful expediency, and the reservation of the power to sever the union was in keeping with the doubts of the propriety of bringing such an immense extent of country under French law which had been freely expressed by the speakers during the debate on the Bill. This saving clause was constitutionally acted upon through Parliament in 1791 when the time had apparently arrived for a severance of the union, by a message from His Majesty informing Parliament of his intention to divide the Province of Quebec into Upper Canada and Lower Canada, whereupon Parliament proceeded, in accordance with the message which is recited in the Act, to provide a constitutional form of government for the new Provinces. All this was done in accordance with strict constitutional rule, and at the same time in harmony with the saving clause, which in no sense, either expressly or impliedly, indicated that His Majesty's pleasure should be used in the enlargement of the already unwieldy (especially so in 1774) Province of Quebec.

The conclusion which we arrive at is that the argument as to the enlargement of the boundaries by the prerogative of the Crown entirely fails, and that the question must be determined upon the reading of the Statutes and other evidence of title.

The constitutional principle, that an Act of Parliament cannot be varied or suspended by an Order in Council, Proclamation, or other independent act of the Crown, cannot, of course, be impugned, but here the effort has been to establish an authorized exception to the rule, through the saving clause in question, and the Commission and Proclamation which have just been discussed. But the establishment of the two Provinces of Upper and Lower Canada under the Act of 1791, put an end to any further contentions of the same kind; that Act was full and final unless repealed or altered by Parliament, so that it becomes altogether immaterial in what form, as to description of territory, the Commissions to the respective Governors after that date were issued.

A brief survey of the ground will assist a correct understanding of the difficulties of the case.

If it be followed to the end, where would the eastern bank of the Mississippi lead to? The source of that river is known to be Lake Itasca, in the State of Minnesota, nearly in the same line of longitude as the North-west Angle of the Lake of the Woods,  $95^{\circ}$  west, and in  $47^{\circ} 38'$  north latitude. Between that point and the Lake of the Woods there is a considerable height of land, which divides the two great water systems of the Mississippi and the Hudson, the former draining southwards to the Gulf of Mexico, and the Lake of the Woods draining northwards through Nelson River to the Hudson's Bay. But the Statute requires the line to lead to the southern boundary of the Hudson Bay territory. How is this to be accomplished? The arbitrators seem to have essayed it, by a line drawn due north from Lake Itasca through the height of land to the North-west Angle of the Lake of the Woods, about one hundred and twenty miles, where British ground is reached, and thence by following the same due north line to English River, a further distance of one hundred miles, or thereabouts. English River we must suppose to have been intended by the arbitrators as the southern boundary of the Hudson's Bay Company's territory. What is the result? That the arbitrators have been obliged at the last to adopt a due north line in order to reach the point of destination. The word "northward" in the statute has been made to do double duty, first in a north-westerly course along the river bank, and when that failed to reach the goal, by a gap of over two hundred miles, then a direct northern line had to be run, as we have seen, to English River, the assumed point of destination. This is the only mode of reaching the angle of the Lake of the Woods, consistent with the Quebec Act, as read according to the Ontario view. But Col. Dennis has suggested that the height of land which divides the two great water systems of the Hudson and the Mississippi, and which lies immediately north of Lake Itasca, may be accepted as the Company's southern boundary. There is much to favor this view. This height of land was the southern boundary of Assiniboia before the 49th parallel was established as the International boundary; and according to Mr. D. A. Smith's evidence, the Company held forts or posts there, and their claim of title extended thus far. The effect of adopting this as the southern boundary, intended by the Quebec Act, would be to establish the height of land round the head of Lake Superior, as the Ontario boundary, and would leave the Province in possession of a tract of some sixty miles in width, including the Thunder Bay and Prince Arthur settlements. This suggestion is, however, in direct conflict with the award.

But there is still another route to the Lake of the Woods, which is relied upon and which should also be explained. Shortly after the Treaty of Peace between Great Britain and the United States (3rd September, 1783), which defined the future boundaries between the two nations, a new Commission was issued by the Crown to Sir Guy Carleton (22nd April, 1786), which gave a new description of the boundaries of the Province of Quebec. Commencing in the east at the Bay of Chaleurs, thence to the St. Lawrence, and running westward through the great Lakes and their water communications, thence to Rainy Lake and along Rainy River to the North-West angle of the Lake of the Woods, and from thence in a due west course to the Mississippi\* and northerly to the southern boundary of the Hudson Bay Company's territory. This Commission was relied upon as carrying the boundary to the Lake of the Woods, but where next? In a due west course to the Mississippi is an impossible boundary, for the source of the Mississippi is south, as we have seen, some 120 miles from the Lake of the Woods, and there is no Mississippi to the west. But Ontario claimed to follow this last due west course, if not to a Mississippi, then to a branch of the Missouri called White Earth River, which crosses the International boundary, running from the north at about 350 miles west of the Red River. This, then, was the western boundary claimed by Mr. Mowat. The northern boundary

\*The description up to this point follows the Treaty boundary of the United States, but that had nothing to do with the western boundary of Canada. It was afterwards discovered by the two Governments that the Mississippi was south, not west of the Lake of the Woods, and they changed the boundary to the 49th parallel of north latitude.



being the Northern Saskatchewan, taking in as part of Ontario all the Province of Manitoba, with a large portion of the fertile belt beyond its western line.

In support of this view the theory was advanced that the Missouri of to-day (or its affluent the White Earth River) was the Mississippi of the Quebec Act, but the evidence of the early explorers is too clear to admit of such a novel proposition. The story of the Mississippi in its connection with our enquiry may be thus briefly told:

The upper Mississippi was discovered by Joliet and Marquette, who in 1673 voyaged to Green Bay, on Lake Michigan, in their bark canoes; thence they ascended the Fox River and portaged to the River Wisconsin which they descended till it joined the Mississippi, which they then followed down to 33° north latitude, passing the confluences of the Missouri, the Ohio, and the Arkansas. These men understood and spoke the Indian languages, were accompanied by Indian guides, and were amicably received by the Indian tribes inhabiting the river banks, from the notes of their voyage it is clear that the Mississippi of to-day was the Mississippi of the Indians, and the Missouri of to-day was the Indian Missouri. (Garneau, vol. 1, p. 255.) La Salle followed the same route in 1679, and in 1682 he succeeded in accomplishing the first voyage to the Gulf of Mexico, by the Mississippi River (Bancroft, vol. 2, p. 329). Through La Salle's discoveries and reports, followed by French settlements, Louisiana became a French possession of great importance. It at first included the great basin of the Mississippi bounded by the high lands, the nearest European possessions to the east lying on the Atlantic side of the Alleghany range. But the title to this vast territory was changed by the Treaty of Paris of 1763, whereby France withdrew to the west side of the Mississippi which then became her eastern boundary. After the war of Independence the United States became the possessors from the Atlantic to the Mississippi, their eastern and western boundaries, so that in the treaty of 1783, between Great Britain and the United States, which defined the International boundary, the objective point was the Upper Mississippi, as the United States could go no farther west (Twiss, Oregon, 205), but the source of the Mississippi not having then been traced was supposed to be somewhere northwest of the Lake of the Woods, and hence the provision of that treaty "in a due west course to the Mississippi. This mistake was discovered, and by the treaty of 1794, a joint survey of the river, from the Falls of St. Anthony to its source, was agreed upon. This never was done, but the source was traced in 1798 by Mr. Thompson, the astronomer of the North-West Company, who determined it to be in 47° 38' north latitude (Lake Itasca), and, therefore, as no line could be drawn to it westward from the Lake of the Woods, it was provided by a convention of 12th May, 1803, signed at London, that the line should be run from the north-west corner of the Lake of the Woods by the shortest route to the Mississippi (which would have been a nearly due south line). But the United States having about this time acquired, by purchase, from France, Louisiana and all the French territorial rights west of that river, this line was never run, and in 1818 the proposed boundary was changed, to suit the altered circumstances, to the 49th parallel west from the Lake of the Woods.

In this sketch it will be seen that there never was any ground for the theory that the Mississippi of to-day is not the Mississippi of 1774, which only rests for its support on some of the maps of that period, which could hardly, in the nature of things, be expected to be accurate. Twiss says (Oregon, p. 228), "Maps are but pictorial representations of supposed territorial limits, the evidence of which must be sought for elsewhere." Here we have the evidence of educated men carefully recorded and preserved; then we have all the historical facts running side by side, the settlement of Louisiana on the west and of Illinois on the east side of the river, and at the time of the cession to England the Mississippi of to-day was made in fact the line of boundary as pointed to by the treaty and as acted up to by both nations.\*

What then becomes of Mr. Mowat's argument? We left him at the North-west Angle of the Lake of the Woods, where Sir Guy Carleton's commission of April, 1786,

\* See the charter of Louis XIV to Crozet, 1712, Ont. Doc. 41, which grants exclusive trading powers in Louisiana, from the sea up the Mississippi to the Illinois, together with the Missouri and the Wabash and all the countries and territories thereon.



had landed him. Where next? The White Earth River cannot avail; it is but an affluent of an affluent, and that is too distant a relation to be mistaken for the great Father of rivers. The source of the Mississippi is nearly two degrees south of the angle of the Lake of the Woods, but the course to be pursued in accordance with the Commission is due west; it cannot be followed, and the result is that the Commission must be abandoned as an unsafe guide. But it would seem as if the arbitrators had been influenced by this Commission in their adoption of a line due north from the angle of the Lake of the Woods as the western boundary. In our view, this document had no legal bearing on the boundary question, its object was to describe the new southern boundary of the Province in accordance with the boundary of the recent Treaty with the United States, and it faithfully followed that boundary as far west as it went at that time, namely, to the North-West Angle of the Lake of the Woods, and thence due west to a supposed Mississippi. In preparing this Commission, the officials would be careful only that the Governor General should know the extent of his jurisdiction towards the south, so as not to trench upon the authority of the United States; but the Commission itself established no line either south or west. It might be right or wrong, but it could not alter what Parliament had declared to be the western boundary, and that was not affected by the change in the southern boundary caused by the Treaty. The arbitrators had only one of two courses before them, to follow the Mississippi according to the Ontario contention to its source, or the due north line according to the Dominion contention. It would seem, however, that the result as it happens is nearly the same as if the river had been followed to its source (for the Lake of Itasca is in very nearly the same line of longitude as the monument at the Lake of the Woods), and a due north line had then been run to English River, some 220 miles. But we must still revert to the Statute to see whether the process of arriving at that point has carried into effect the true boundary as there expressed, and in viewing the reasons for and against the Mississippi line, we must keep the same map before our mind's eye that Parliament had before it in 1774, when the country was all British territory to the east of that river, and when a continuous boundary from the Ohio and the Mississippi junction northward was being provided for, and we have still to consider the case as it then stood, in order to arrive at a correct conclusion, and if for the reasons that then existed the eastern bank of the Mississippi would have been rejected as not being the true line, then we could never have got so far west as the Lake of the Woods, for it is clear that this Commission could not carry us there.

The reasons against the Mississippi line we have already given. One was that it did not reach its point of destination, but left a gap of 220 miles, from Lake Itasca to English River; that was on the assumption that English River (as decided by the arbitrators) was the point of destination, *i. e.* the southern boundary of the Hudson Bay territory. But if Col. Dennis' suggestion be well founded, that the height of land immediately north of Lake Itasca was, in 1774, the southern boundary of the Hudson Bay territory, that objection would fall to the ground. But neither would we in that case have reached the Lake of the Woods, for the height of land being the boundary of the Province to the north, would have led eastwards towards Lake Superior and then northerly round the head of the Lake, so that the true boundary of Ontario and Quebec in that view would be the height of land that leads from near the Labrador coast to the International boundary at the head of Lake Superior.

There were two transactions which may be noticed here, and which we think bear upon the boundary at the head of Lake Superior.

1. The purchase by the Hudson Bay Company from the Government of the Province of Canada, under an Order-in-Council of 1st July, 1854, of a considerable tract of land at Fort William, fronting on Thunder Bay.

To this may be added the evidence afforded by the Company's map produced before the Committee of the House of Commons in 1857, which indicates the height of land some 50 or 60 miles to the west of Thunder Bay as their boundary.

2. The Treaty of 7th September, 1850, between the Government of the Province of Canada and the Lake Superior Indians, whereby the height of land is acknowledged to be the boundary of the Hudson's Bay Company under their charter.

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These two admissions have, we think, an important bearing on the question of title to that part of the territory which lies west and north-west of Lake Superior (within British limits); and taken in conjunction with the territorial jurisdiction exercised by the Province of Canada, and since Confederation by the Province of Ontario, should dispose of the question without regard to the due north line from the junction of the Ohio and the Mississippi. Both admissions point to the height of land as the true boundary.

Besides the Commissions and Proclamations just referred to, there are many other Commissions and Proclamations and a multitude of maps, reports, historical references and learned opinions bearing on the case, and forming a field for investigation that should occupy months—not days—to master: and if it be conceded that an arbitration is the proper Forum for the adjudication of this important case, still, it must be apparent that an unfortunate choice of arbitrators was made, for the late Chief Justice was, as is well known, an overworked man, and the duties of his Court demanded even more than the full measure of his time; the other distinguished gentlemen who sat with the Chief Justice were also men whose occupations were important and pressing, and though it has been stated that they had read and considered the printed documents that were submitted to them, we know that a mass of evidence and important matter was brought to light by the committee which was never brought to the notice of the arbitrators previous to the award.

Turning to the printed report of the proceedings, we find that the arbitrators met at Ottawa for the first time on the 1st of August, 1878, and that they then adjourned to the following day without transacting any business; that on the second day the arguments of counsel were heard; that no evidence, *viva voce*, was taken, or indeed offered, and that at the opening on the third day the Chief Justice said: "Before proceeding I would state, without having any desire to unduly hurry the argument, that if there is any probability of its being concluded by one o'clock, there is a prospect of the arbitrators being able to agree this afternoon."

Mr. McMahon (the senior counsel for the Dominion) then said: "I will shorten my argument very much."

On that same afternoon the award was signed and delivered by the three arbitrators.

A Select Committee was appointed by the House of Commons during the Session of 1880 to inquire into and report upon all matters connected with the boundaries between Ontario and the Territories of the Dominion. The Committee sat from day to day, took the evidence of a number of witnesses, and examined a mass of documents, those used to sustain the Ontario case, as well as those for the dominion, some of the latter having been discovered subsequent to the award. It was shown to the Committee that in 1818 a trial for a murder, committed (the De Reinhardt case already referred to) in the North-West Territory, over which the Courts of Lower Canada had then jurisdiction, took place at Quebec before Chief Justice Sewell and Mr. Justice Bowen under a Special Commission, and that it became the important question whether the offence was committed in Upper Canada or in the Territory, if the former the Court had no jurisdiction, and the prisoner would have been entitled to his discharge, thus it became necessary for the Court to determine the true western boundary of Upper Canada. After lengthened argument by counsel upon the construction of the Quebec Act (1774), the Chief Justice pronounced judgment in favor of a line drawn due north from the junction of the Ohio and Mississippi rivers, stating at the same time that such was also the unanimous opinion of his brother Judges, all of whom he had consulted. In the same case the Chief Justice also held that the Proclamation of General Clarke in pursuance of the Constitutional Act of 1791 had only the effect of dividing, not enlarging, the Province of Quebec as established by the Act of 1774.

Mr. Justice Ramsay of the Court of Queen's Bench of Quebec was examined before the Committee, he had given the boundary question much attention and study, and had in 1873 made a Special Report (put in) upon the history and the legal, as well as Constitutional features of the case, his opinion coincided with Chief Justice Sewell's, the correctness of whose judgment he seemed to think no lawyer would question.

Mr. Justice Johnson of the Superior Court of the Province of Quebec was also examined. He had held the offices of Governor and Recorder of Assiniboia (Red River country) from 1855 to the end of 1858. He stated that the Colony of Assiniboia had been recognized by the Imperial Government in a variety of ways as a *de facto* Colony of England, under the charter of the Hudson's Bay Company, that the Colony had been formally established under a set of laws adopted by the Governing Board in London, and that British troops had been sent out for the protection of the Colony by the Imperial Government directly, through the intervention of the Company and quite independently of Canada, he had always considered that the northern boundary between the Hudson Bay Company and Upper Canada was the height of land which separated the water drainage of the Hudson from that of the St. Lawrence, and that the western boundary was a due north line from the junction of the Mississippi and the Ohio in accordance with Chief Justice Sewell's decision in the De Reinhardt case, which he entirely approved.

Mr. Justice Armour of the Ontario Court of Queen's Bench, was also examined. He had been retained as counsel for the Dominion, but had withdrawn from the case when he was appointed to the bench; he had devoted much time to the study of the case, and had examined all the law and documentary evidence bearing on it. He said the claim of Ontario to go beyond the height of land was founded on a number of circumstances which, in his opinion, established no legal right. The height-of-land was, in his view, the boundary on the north, and also on the west. The De Reinhardt case, he said, was a clear decision, and if he were deciding judicially he would feel bound to follow that decision; still, his own view was that the height of land was the true boundary on the west\* as well as on the north. He desired it to be understood, he said, that he was not speaking as a counsel in the argument of a case, but was giving his conscientious opinion.

It is not proposed to follow the evidence taken before the Committee, which would be beyond the scope of this paper. These three opinions are given for the purpose of showing that able judges of our highest courts to-day look upon the De Reinhardt case as an authoritative decision, and that so far, it has not been overruled or questioned by any of the courts of either Ontario or Quebec.

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\* Judge Armour's opinion as to the western boundary agrees with the suggestion made by Colonel Dennis, and would, if carried out, place the line about 60 miles west of Fort William. This view is also entertained by Judge Ramsay upon equitable considerations, Ontario having made improvements and spent her public money on the tract between the height of land and Thunder Bay.

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## PART II.

An argument has been advanced, that the Dominion should be estopped from asserting her rights, because her Ministers in past contests with the Hudson's Bay Company expressed opinions at variance with their position in the present dispute. That they denied the validity of the Company's charter is perfectly true, and it is also true that they claimed for Upper Canada in 1869 the country west to the Red River, for, undoubtedly, they had been misled by the supposition that the Order in Council of August, 1791, had enlarged the Province of Quebec to the utmost extent of Old or French Canada, which was not the fact, as more recent investigation has established. The Dominion ministers failed in their contention with the Company, for the Imperial Government refused to annul or even question the charter, and the claim of Upper Canada to the Red River Settlement was found then to be just what it is to-day—a delusion. The wisest course under the circumstances, as all now admit, was that which was adopted by the Canadian ministers—the purchase of the territories from the Company. It would be strange, indeed, if because they had done their duty in pressing the views of their Government to a point proved to be untenable, the same ministers should not now with perfect good faith and consistency be entitled to maintain the position that they were forced by a superior power to accept. It seems clear enough to us, to-day, that the Government in 1869, and, indeed, throughout its contentions with the Hudson's Bay Company, supported as it was by the almost unanimous public opinion of the country, occupied really a very untenable position in regard to its claim to possess the territory west of Lake Superior. That the French settlements had at one time extended up to and far west of the Red River cannot be denied; what then? That does not help the position of Ontario in the least, so far as her progress westward is concerned, for that was barred by a line of limitation. There may be a difficulty about determining the exact position of that line, the Statute has to be construed one way or the other, but, when once ascertained, we (meaning Ontario) can go no further. The true position is lost sight of. Great Britain held the continent, so to speak, extending from ocean to ocean, and she chose to carve out of it, the Province of Quebec, which so far from having been made commensurate with old French Canada, was given a western frontier, beginning, as we have seen, at the junction of the Ohio and the Mississippi. It matters not to us now what the French did in the west before the cession to Great Britain in 1763, whether they were simply intruders without claim of right or were engaged in actual conflict with the Hudson's Bay Company? If there was any debateable ground left between them it came to Great Britain, not to Upper Canada. But as to the northern boundary the case is different. The Dominion, like the great Canute, has to retire before the advancing waves; what she loses Ontario gains, because the northern boundary of the Province of Quebec by the same Act of 1774 was made to march with the territory of the Hudson Bay Company wherever that might be.

The effect sought to be given to the proclamation of General Clarke, of 18th November, 1791, and the claim that the Province of Quebec had thereby become co-extensive with the undefined Canada of the French, is aided and assisted by efforts to establish, by evidence, that both in the north and in the northwest French ascendancy and territorial rights had been acquired. As regards the dominancy over the Hudson's Bay, straits, shores and rivers, we have the prior right by discovery claimed for France, although history had always heretofore given that honor to England, but the discoveries throughout this case have been very wonderful. Then we have French naval supremacy asserted, and the withdrawal of the French flag from those northern seas after the Treaty of Utrecht (1713) declared by an eminent Q. C., to have really meant a proclamation of renewed sovereignty. From the new reading he has given to the 10th article of that treaty, which runs thus: "It is however, provided that it may be entirely free for the Company of Quebec and all other



subjects of the Most Christian King (Louis XIV) to go by land or by sea wheresoever they please out of the lands of the said Bay," of course such perfect freedom of action meant nothing less.

Then we have extracts from travels, references to history, the memoirs of the priests and the *relations* of the Jesuit Fathers to establish that the French fur traders and voyageurs penetrated to the most distant places in the north-west, to the shores of Lake Athabasca, to the sources of the Saskatchewan, to the very base of the Rocky Mountains long anterior to the conquest. But the conclusion is inevitable that when France ceded to England, in 1763, all her sovereignty in North America, excepting only Louisiana and her territory to the west of the Mississippi, all question of French territorial right must cease, and the only remaining questions that can arise are those between England as the supreme power, Hudson's Bay Company, under a British charter, and the Province of Quebec as enlarged and established by the Imperial Act of 1774, or as again enlarged, if it was enlarged, by the Act of 1791, establishing the two Provinces of Upper and Lower Canada. All the mist and confusion imported into the case from French wars, conquests, discoveries and settlements, and the controversies arising therefrom in former times should properly be laid aside as having no legitimate bearing on this present territorial dispute.

Upper Canada (or Ontario) must maintain her right as a British Province, not under any imaginary inheritance of rights derived from France or the French people, acquired, if they ever were acquired in those remote regions, against the national flag whose supremacy was finally acknowledged by the Treaty of Paris.

We will turn now to the consideration of the northern boundary of Ontario as delineated by the award: "Commencing at a point on the southern shore of Hudson Bay, commonly called James' Bay, where a line produced due north from the head of Lake Temiscaming would strike the said south shore, thence along the said shore westerly to the mouth of the Albany River, thence up the middle of said river and the lakes thereon to the head of Lake St. Joseph, thence by the nearest line to the east end of *Lac Seul*, thence westerly through *Lac Seul* and the English River to a point where the same will be intersected by a true meridional line drawn northerly from the monument at the north-west angle of the Lake of the Woods."

Much stress has been laid, as we have already indicated, upon the effect of the Order in Council of the 19th August, 1791, which established the line of division between Upper and Lower Canada, in its bearing upon the northern boundary. The recitals contained in the Proclamation of General Clarke and in the Commission of Lord Dorchester are precisely the same as regards the mere description of the line "from the head of Lake Temiscaming by a line drawn due north until it strikes the boundary line of Hudson's Bay. "The question is does this form of words mean the bay or the territory of the Hudson's Bay Company. A boundary line is an improper expression to apply to a bay which has a natural boundary of its own—a shore. The water would not be a bay without a shore. Both are required to form a bay; but a boundary line it has not, for one of its parts is the boundary. You would not say the boundary line of England, but the shore or boundary of England; but you would say the boundary line of France, because France has no natural boundary (towards the interior), and has instead an artificial line to define its limits. It is the word "line" which makes all the difference. Then we must look to the boundary established by the Quebec Act, 1774. After leaving the junction of the Ohio and Mississippi the boundary runs "northward to the southern boundary of the territory granted to the Hudson's Bay Company." This, then, is the northern boundary of the whole province from west to east. That is legal notice of the charter; and thus the word line, inapplicable to a bay, is seen to be applicable to the territory—the western extension of which the arbitrators have already discovered at English River in defining the western boundary many hundred of miles distant, and they ought to have had no difficulty in recognizing the same territory dependent on the same title at the Hudson's Bay itself, the root, as it were, of that distant offshoot.

The line of the Hudson's Bay territory is clearly the true construction of this limitation, and that line, according to the Company's contention, is the height of land which divides the water systems of the Hudson and the St. Lawrence; but the arbi-

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trators have carried the division line to the shore of the bay, thus ignoring the Company's title in this part of the territory.

We have seen that in the De Reinhardt case this Order in Council was held to have established the division line between the two provinces—nothing more. No extension of limits in any direction; and since its date (19th August, 1791,) the subject of the Hudson's Bay territory has been twice investigated by Select Committees of the House of Commons. On the last occasion (1857) an exhaustive enquiry took place into the territorial rights, claims and possessions of the Company. A map, specially prepared, exhibited the Company's territory, coloured green, to contrast with pink for what was admitted to be Canada, and on it the height of land leading from east to west, forming the ~~the~~ water-shed, at a distance of about two hundred miles south of the bay, is the distinctly marked boundary between the two countries. There could be no mistake. All present saw by the map the division about midway between Hudson's Bay and Lake Ontario. Sir George Simpson, the Governor of the Company, was examined at great length. He claimed up to that boundary on behalf of the Company. Chief Justice Draper was also examined, and put in a written statement on behalf of Canada, and although he referred therein to the Statutes of 1774 and of 1791, and, also to the Order in Council and General Clarke's proclamation containing the words "to the boundary line of Hudson's Bay," yet he made no claim that by either one or other of these instruments had the boundary been carried to the shore. On the contrary, he stated in the same paper, that "the union of the Provinces has given to Canada the boundaries which the two separate Provinces of Upper and Lower Canada had, the northern boundary being the territory granted to the Hudson's Bay Company." The Secretary of State for the Colonies, the Right Honorable Henry Labouchere, was chairman of the committee, which finally reported on all matters referred to it on the 31st July, 1857. Mr. Labouchere, on the 22nd January, 1858, in a despatch transmitting a copy of the report to the Governor General, Sir Edmund Head, says: "Her Majesty's Government has come to the conclusion that it would be impossible for them to institute proceedings with a view of raising this question (as to the validity of the charter) before a legal tribunal without departing from those principles of equity, by which their conduct ought to be guided. If, therefore, it is to be raised at all, it must be by other parties on their own responsibility. With regard to the question of boundary as distinguished from that of the validity of the charter, Her Majesty's Government are anxious to afford every facility towards its solution, a mode of accomplishing which is indicated in the correspondence, if such should be the desire of Canada." The mode indicated was a reference of the question to the Judicial Committee of the Privy Council as recommended by the Law Officers of the Crown, but the suggestion was not acted upon by the Provincial Government, nor was any step taken in that direction.

It will be borne in mind that the Company were openly in possession of this part of the country by their occupation of forts and trading posts on James' Bay, and had been in undisturbed possession ever since the Peace of Utrecht, about one hundred and fifty years, and that by common consent and reputation, the height of land had been for a long period of time treated practically as the true boundary; that it is marked as the boundary of the Province on nearly all the maps in use, and the surprise is therefore natural that it should have been discovered by the Arbitrators now that by an Act of the Crown, the effect of which was apparently unknown to Her Majesty's Government and to all the members of this Select Committee, and had not been remarked by the acute mind of Chief Justice Draper, this reputed boundary had been materially changed so long ago as 1791.

We agree, however, with the arbitrators in the view that it was competent to the Crown by virtue of its prerogative powers, to have changed this northern boundary while it remained unaffected by Statute by a duly promulgated Order in Council. But no such Order was ever passed, and we venture to express the opinion that it never was the intention of the Crown thus to override the Charter of Charles II., which at all events in respect of the grant of the shore, and "the lands upon the coast and confines of the bay," is free from any kind of doubt; whatever may be said as to the distant territories upon the rivers leading into the bay, such an act of the

Crown would have been utterly at variance with the policy that has been always upheld by the Imperial Government in regard to this charter and in direct conflict with the opinions of its law officers, and we must look for some more solid foundation to support such a conclusion than the strained interpretation put upon the words "boundary line of Hudson's Bay."

But the award has given to the Province 100 miles of the actual shore as well as the interior country with the forts and trading posts there standing.

One or two points in connection with the Royal Commissions to the Governors General we may mention in passing, not that we attach importance to them as being authoritative on the question of boundary, but because they have occupied a conspicuous place in the discussions. The argument of Ontario as to the enlargement of the Province by the Acts of the Crown depends on the saving clause in the Quebec Act, and the first Commission to Sir Guy Carleton after it was passed, and on the Proclamation of General Clarke—those disposed of, all the rest require but slight remark. These points are—

1. The Commission of 22nd April, 1786, to Sir Guy Carleton which carried the boundary line to the angle of the Lake of the Woods and thence due west to the (supposed) Mississippi River, was in words expressly revoked and determined by the Commission of 1791 to Lord Dorchester. Whether that was done in view of the obvious error contained in the former, it is now impossible to say, but it shows how unreliable these documents would be if we were obliged to depend upon them as authorities upon the boundaries.
2. The Commission to Lord Durham in 1838 defines two boundaries for Upper Canada, the eastern and the southern. The eastern gives the line of division from Lake Temiscaming due north, but carries it to the shore of Hudson's Bay instead of to the boundary line as in Lord Dorchester's and subsequent Commissions. This supports the view taken by the arbitrators, and no doubt had its effect in influencing their decision. The southern line carries the boundary along the St. Lawrence through Lakes Ontario, Erie, and Huron, thence into Lake Superior, and there stops abruptly, going no further west.

We might indulge in a number of speculations as to how these mistakes arose. Probably the official scribe in preparing the instrument, having no knowledge of a Hudson's Bay territory, used the proper expression "shore," believing such to have been intended in the previous Commissions, and having some doubt as to an extension beyond Lake Superior, he contented himself with running his boundary *into* the lake and so making an end of it.

One thing is at all events certain, that the Crown never intended by these instruments, even if it could have legally done so, to have changed any of the existing boundaries; they did not profess to enact new boundaries, they were either rightly or wrongly following existing boundaries—that was all.

No other boundary of the Province of Quebec towards the north was ever given than that mentioned in the Act of 1774, *i.e.*, the southern boundary of the territory granted to the Hudson's Bay Company. We must, therefore, examine the Hudson Bay Company's title to the territory in that direction.

By his Royal Charter in 1670, Charles II. granted to the Hudson's Bay Company for ever, together with the right of exclusive trade therein, all the lands and territories that were not possessed by the subjects of any other Christian prince, situate upon the coasts, seas, lakes, bays and rivers in whatsoever latitude within Hudson's Straits, to be known thereafter as Rupert's Land, with power to make laws for the good government of the Company and its Colonies and Possessions. During the French wars the Company lost and regained and again lost certain of its forts and trading posts on the Hudson's Bay, and this state of things continued till the Peace of Utrecht in 1713, when France finally withdrew from all claim to the possessions upon the Hudson's Bay and its waters. By the Treaty it was provided that France should restore to England, to be possessed in full right forever, the Bay and Straits, together with all the lands, seas, coasts and rivers belonging thereto. "No tracts of land or sea being excepted which are at present possessed by the subjects of France." The fortresses and buildings to be delivered over within six months,

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And it was further provided that within a year the limits between the Hudson's Bay and the places still appertaining to France, should be determined by Commissioners to be appointed between the two Powers; and further that France should make satisfaction to the English Company trading there, for all damages and spoil done to their colonies and ships. In pursuance of this Treaty, full possession was delivered to the Hudson Bay Company, under a Commission from the Queen (Anne) and the Company on the one hand, and another Commission from the French King and the Canada Company (a French fur company trading at Quebec) on the other, and the French settlers at the Bay were brought away in an English vessel sent out for the purpose. Subsequently the Hudson's Bay Company addressed repeated memorials to the Government on the subject of payment of their losses, and praying for a settlement of the boundary between them and Canada; and in the year 1719, Commissioners were appointed by the King (George II.) to treat with the Commissioners of France at Paris, on these and certain other subjects of difference. The English Commissioners were instructed by their Government to insist upon the 49th parallel of north latitude as the southern boundary of the Company's territory, beyond which the French were not to pass on any pretence, by land or sea, or on or through any lakes, rivers or countries. The Commissioners met, but their discussions led to no result. The English Commissioners complained that the French Commissioners could not be induced to come to any settlement of these questions, and they were finally directed by the English Court to withdraw from Paris. The Hudson Bay Company were never afterwards disturbed in their possessions by France, although other French wars followed, which were eventually concluded by the Peace of Paris and the cession by France to England in 1763, of Canada and all its dependences.

The Counsel for the Ontario Government attached much importance to the position which the Hudson Bay Company had occupied at the time of the Treaty of Ryawick (1697) which followed the capture of several of their forts by the French, and their submission to a reduction of their possessions at that time. That the Company submitted (under protest) as they were obliged to submit to the misfortune of war is undeniable, but a fresh war quickly brought a change of fortune, and by the Treaty of Utrecht already alluded to, France was compelled to restore to England all these conquered possessions.

It is a principle of the Law of Nations that a reconquest restores to the subject property previously lost to the enemy. The Crown is bound to protect the lives and properties of its subjects and to restore the latter, if temporarily lost and again recovered. But Ontario contended that here a fresh grant was necessary, and that as to all the possessions so lost to France and restored by her after the Peace of 1713, the Company's title was lost. The Crown, however, did not take this view of its duties, for nothing seems more clear than that the course pursued by England in sending out a Commissioner in 1713, to take over from the Commissioner appointed by the French King a complete delivery of all the forts and places in the possession of the French, and the actual restoration of the same, then and there to the Company, operated and was intended to operate as a re-investiture by the Crown in favour of the Company of all their territory, titles and franchises, and in further proof of this intention, reference may be had to the letters on the subject between Lord Bolingbroke, of 29th May, 1713, and the Duke of Shrewsbury, the British Minister at Paris, of 23rd June, 1713 (Ont. Doc. 152), and the letter of the Earl of Dartmouth, of 27th May, 1713, addressed to the Lords of Trade and Plantations, in which he says: "The Queen has commanded me to transmit to you the enclosed petition of the Hudson's Bay Company \* \* \* Her Majesty did not think fit to receive any act of cession from the French King, and has, therefore, insisted only upon an order from that Court for delivering possession to such persons as should be authorized by Her Majesty to take it. By this means the title of this Company is acknowledged, and they will come into the immediate possession of their property without further trouble." (Ont. Doc., p. 129.) Then as to the boundary between the Company's territory and Canada the formal written demand by the English Commissioners at Paris, in 1719, after the above re-investiture made under the positive instructions of their Government to insist on the 49th parallel of north



latitude as the boundary line is an admission by the Crown that to that extent, at least, the Company's title extended, and the first act of George III., after the cession, was the Royal Proclamation of 7th October, 1763, which established the Province of Quebec and which contained a clear recognition of the grant to the Hudson Bay Company. Again, in the Quebec Act, 1774, Parliament, as we have seen, in defining the boundaries of the enlarged Province, made the southern boundary of the Company's territory, the northern boundary of the Province, and in numerous instances since then the British Crown and the British Parliament have recognized in the amplest manner the Company's title as a valid subsisting title under the charter of King Charles.

England had originally asserted and maintained her prior title to the Hudson's Bay and straits and all the lands and territories upon the rivers and waters leading thereto by right of discovery, in accordance with the law of nations. Sir Travers Twiss says: "The title which this charter (of Charles II.) created was good against other subjects of the British Crown by virtue of the charter itself, but its validity against other nations rested on the principle that the country was discovered by British subjects. The only nation that contested England's title by discovery was France, and that contest was settled by force of arms, followed by the Treaty of Utrecht, and the claim of France to the Hudson's Bay was never revived.

The theory of the high-land boundary proceeds from the law of title by discovery. France, by discovery, acquired the St. Lawrence valley and the country upon the lakes, rivers and waters discharging through it to the sea, and thus the height of land that encloses its vast water system towards the north, south and west, became the legal as well as the natural boundary of Canada. Again the Mississippi carried from its source bounded by its high lands the title of French discovery towards the Gulf of Mexico, while in the north the Hudson carried the English title along its great rivers to the high lands from which they flow. In 1763, the French title to Upper Canada was on the same footing as the Hudson's Bay Company's title to their territory, both were founded on discovery. Upper Canada was a wilderness, quite as much so as was the Company's territory; there were no settlements and no European population, hardly half-a-dozen insignificant trading posts, \* few indeed, and far between, yet the French title was carried without a question to the height of land at the head of Lake Superior.

The validity of the Charter has been challenged on the ground that the grant of all the lands drained by streams, however remote, which flow into the Hudson's Bay, is vague, indefinite and beyond the competency of the Crown, and on the ground of its having conferred exclusive trading privileges, the latter objection may be dismissed, for it has been acquiesced in by both Parliament and the Crown, and it has, besides, been conceded by the Law Officers that the territorial rights of the Company were not affected thereby.

But the first named objection really brings up the question of title by discovery, which is said to be an inchoate title requiring to be followed within a reasonable time by occupancy of some kind. The principles of International law, which have been laid down by the Jurists on this subject, are drawn from the treaties and practice of the European nations since the discovery of America, and are founded on precedents. Our own history furnishes ample authority for such an extreme exercise of Royal power (as it appears at the present day): the Charter of Queen Elizabeth to Sir Walter Raleigh in 1584, under which Carolina was founded; the Letters Patent of James I in 1606 to Sir Thomas Gates and others, granting all the territory on the Continent of America between 34° and 40° north latitude; the Charter of 1609 to the Company of Adventurers of London, granting the colony of Virginia, which extended along 400 miles of the coast, and "ran up, into the land throughout from sea to sea, west and north-west, including all the islands within 100 miles along the coast of both seas;" the Charter of James I to the Council of Plymouth in 1620, for the colonization of New England from the 40th to the 48th degrees of north latitudes, and extending in length from the Atlantic to the Pacific; the Charter of Charles II. to Lord Baltimore, in

\* Frontenac, Niagara, Sault Ste. Marie, Nepigon and Fort William.

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1633, under which Maryland was founded. Pennsylvania was chartered by Charles to William Penn in 1680 (Bancroft, Vol. 1.) In all these cases the Charters preceded the occupancy, and were founded on discovery alone, the interior of the country being wholly unknown. Spain, Portugal and the Netherlands recognized and acted upon; the same principle, and if we turn to France we find in the first Commission to a Canadian Governor, in few words, the same extent of sovereignty asserted as was assumed by Charles II. in the Charter of the Hudson's Bay Company, the words of the Commission from the French King, Charles IX., to the Marquis de la Roche in 1598 are "Canada, Newfoundland, &c., the river of the great bay (St. Lawrence) and the lands adjacent to the said provinces and rivers, which are the whole length and depth of the country, provided they are not inhabited by the subjects of any other Christian Prince." (Ont. Doc. 39). And the Commission to the Marquis de Lauzon, 1651, appointed him Governor "over the whole extent of the St. Lawrence and the islands and lands adjacent on both sides, and the other rivers that discharge therein." (Ont. Doc. 40.) Thus did France, three-quarters of a century before the Hudson's Bay Charter, exercise sovereign proprietary powers over an unknown interior of country, through and in connection with its rivers and water communications, while her actual occupancy was confined to the seaboard; and yet it has been asserted that the claim of title set up by the Hudson's Bay Company to follow the rivers to their source was unsupported by precedent, and that its only basis was a fiction and invention.

Phillimore, in treating of this subject, says (Vol. 1, 348): "The occupation of a portion of the sea coast gives a right to the usual protecting limit at sea, which is held to exist in all old countries. The right of dominion would extend from the portion of coast actually and duly occupied inland so far as the country was uninhabited, and so far as it might be fairly considered to have the occupied seaboard for its natural outlet to other nations." Again, he quotes, with approval from the negotiations between Spain and the United States respecting the western boundary of Louisiana, the following principle there laid down: "When any European nation takes possession of any extent of sea coast, that possession is understood as extending into the interior country to the sources of the rivers emptying within that coast, to all their branches and the country they cover, and to give a right in exclusion of all other nations to the same."

But it is conceived that neither the validity of the Charter nor the extent of the territory professed to be conveyed by it, can any longer be considered an open question for the action of the Crown and of the Imperial Parliament especially, since the enquiry before the House of Commons in 1857, and the acquiescence of Canada therein, followed by the purchase by the Dominion of the Company's title, must effectually estop Canada and every Province of Canada from the repudiation of that title, and therefore the charter of Rupert's Land should be accepted for all purposes as valid and subsisting, and hence it can only be by adverse occupancy, sufficient to establish a title in itself, or by the geographical features of the territory, as they indicate the limits of the water shed of Hudson's Bay and Straits, that the claims of Ontario to have her boundary rectified towards the north can be successfully maintained.

One of the points relied upon by the Counsel for Ontario during the argument, was that the title of the Hudson's Bay Company had never been consummated by actual occupancy, that prior to the acquisition by England of the French title in 1763, the French fur-traders had penetrated to the interior of the country in the north and in the north-west, and had established posts and factories at numerous points on its lakes and rivers, and had thus acquired a title by discovery and occupancy against that of the Company, and that the latter had confined their actual occupation during all that time to the Bay and the mouths of its rivers. The latter part of the proposition would seem to be true; but it is equally true that from the cession of 1763 the French traders had gradually withdrawn from those settlements and had voluntarily given place to the Canadian North-West Company, which from the year 1785 occupied all the advanced posts in the territories. The conflicts that arose between that Company and the Hudson's Bay Company, and the efforts of the

latter to expel the former, are too well known to require more than a passing allusion. It is enough for the present purpose to say that the individual French traders disappeared, having become merged in the North-West Company, and had entirely ceased from the last-named date to have any interest or occupancy in the territory, excepting as partners or shareholders in the North-West Company, which had become a formidable competitor of the Hudson's Bay Company. This new Company, we find (Mackenzie's travels, chap. 1) was possessed of ample means, employing a force of 2,000 voyageurs, they had established a large number of factories and trading posts, which were scattered through the territory. But in 1820, these two rival companies became united and brought into one concern their capital and possessions, under the corporate name, powers and title conferred on the Hudson's Bay Company by their charter. At the time of this union, the Company thus re-formed held 133 forts and trading posts, extending in all directions on the Hudson's Bay and on all the rivers and waters of the northern part of the continent. The North-West Company had been the first Europeans to cross the Rocky Mountains in the northern latitudes, and had established trading posts on the Pacific coast, even to the mouth of the Columbia River, which they occupied till that portion of the Oregon territory was relinquished by England to the United States. It has been truly said that to this Company, either under the name of the North-West Company or under its present name, and the title and occupancy thereby held and maintained, first as against France and then as against the United States, that England and Canada to-day are indebted for the broad highway that has been left open to the Pacific Ocean.

From the foregoing facts it will be seen that the French titles of occupancy and discovery in the interior (if they ever had a tangible form), passed now nearly a century ago to the North-West Company, and from that Company, in 1820, to the present Hudson's Bay Company, whose title, according to the arguments of the Ontario Counsel, should have become strengthened rather than weakened by these industrious researches and collections from the old French manuscripts.

In connection with the question of occupation, the arbitrators seem never to have considered the colony of Assiniboia which had been in existence over half a century prior to the date of the award, numbering, as was estimated in 1869, over 10,000 souls, with a civil government formed under the charter of the Hudson Bay Company, its own laws, a court of civil and criminal jurisdiction, with powers over life and property, where the death penalty had even been enforced, whose jurisdiction extended, according to the evidence of Judge Johnson, throughout the Red River settlements to the International boundary on the south and on the east to that height of land at the head of Lake Superior, which was recognized by the Government of Canada, in 1850, in a formal treaty made with the Indians of that region, as "the height of land which bounds the territory covered by the charter of the Honorable the Hudson Bay Company," a colony officially known to and recognized by the British Government, \* which sent troops for its protection on two occasions *via* Hudson Bay and the Nelson River, through the intervention of the governing board of the Company in London. In the year 1869, when the Dominion acquired these territories, the occupation of the part which has been awarded to Ontario stood thus (besides the Assiniboia occupation): the Company held a post at Lake Abitibi, within a day's march of the height of land and 150 miles south of the Hudson or James' Bay. To the west of that stood New Brunswick House, also close to the height of land, and about the same distance inland from the bay. Again, to the west of that stood another post on Long Lake, also close to the height of land, while near the Bay stood Hannah Bay House. To the west of that stood Moose Factory, an important shipping port, and to the north-west stood Albany Fort, and along Albany river and thence along the water communication to the Lake of the Woods, and all through the awarded territory a regular chain of occupied posts was to be found. The Wardens' towers on the Scottish marches in the old border wars were not more distinctly defined or more jealously guarded. In this disputed territory alone the Com-

\* Its statistics were submitted to Parliament and are printed with the proceedings of the Hudson's Bay Committee.

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pany held twenty trading posts, besides over 100 in other parts of the territory. Now it is not of the occupation at the time of the cession by France in 1763 (as contended for by Mr. Mowat) or at any time prior to that date that we need to speak, but of the occupation at the time of the Rupert's Land Act in 1868, which speaks from its date, and it says, "for the purposes of this Act the term 'Rupert's Land' shall include the whole of the lands and territories held or claimed to be held by the said Governor and Company," and Her Majesty was empowered by it to accept a surrender of the territories and to declare by Order in Council the terms and conditions of such surrender, and thereupon Rupert's Land was to be admitted into the Dominion, and it should then be lawful for the Parliament of Canada to make and establish laws for the peace and good government of the same. Her Majesty's Order in Council was duly made, whereby it was provided amongst other things that the Company should retain all the above trading posts along with a block of land to be selected and attached to each. Thus we find that, though no occupation was requisite, an actual occupation existed, and had existed for over 100 years, sufficient to satisfy the most technical requirement, more than sufficient even to establish a title by itself independently of any charter. Yet by this award, regardless of Royal Charters, Acts of Parliament, the Queen's Order in Council, and the possessory rights secured to the Company, the arbitrators have made over to the Province one hundred and more miles of the sea coast with the forts, trading posts and improvements thereon, and a territory of 800 miles in extent from east to west, with an average breadth of 200 miles, containing 60,000,000 acres of land.

A discrepancy has been much commented upon between the claim made by the Company to have the 49th parallel of north latitude declared to be their boundary as urged by the Paris Commissioners in 1719, and the height of land which has more recently been claimed as their proper boundary. There is very little difference between them; the former is only a geographical line which describes as nearly as a straight line can well do, the general bearing of the deviations of the high land. Ontario would gain by the straight line at the east end, and she would lose at the Lake Superior end where the land is more available. In fact, the Province would be a gainer by the adoption of the natural boundary in preference to the straight line; the alleged discrepancy is not worthy of a second thought.

In our view the northern boundary, as awarded, cannot be sustained upon any principle, either legal or equitable.

If we could assume the argument to be sound as to the exclusive claim of inheritance which was pressed upon the arbitrators, it would have been a curious reverse of fortune that time and constitutional changes had produced upon the relative positions of Upper and Lower Canada in regard to the North-West. We have seen the French traders and voyageurs, in the early days, pressing eagerly forward, and passing the Upper Province by, in quest of furs and adventures, the route to China and *La Mer de l'ouest*, while later, the Upper Canadians were felling the forest and tilling the soil, having quite enough on their hands in raising the roof-trees of their homes and villages. They had no eyes for the West till 1857, when Chief Justice Draper was sent home to claim for both Upper Canada and Lower Canada, then united, such portions of the territory as should be found to be fit for settlement; but the knowledge of the country was so imperfect and the difficulties of communication so great, that Canada, then, would have declined to accept the Red River country (as stated by the Chief Justice before the Committee of the House of Commons) if accompanied with engagements involving the opening of direct communication, and the expense and responsibility of its government; and now that the full value of the territory is recognized and communication is being opened by means of the Pacific Railway, the exclusive claim of Upper Canada is put forward as being a right to the inheritance of the early discoveries and titles acquired—as is said—by the French, and whilst the Attorney General waxed eloquent in his arguments in support of French discovery and occupancy as against the Hudson's Bay Company and the British title. He was happily unmindful that the Frenchmen of Lower Canada of to-day have also a claim to be considered; that it was their fathers who had thus spent their lives and their treasure in the prosecution of North-West discovery. And are they to be denied



even the modest share which should come to them through Confederation in all this new found wealth, which is so glowingly set forth in the public documents of the Ontario Government? One item alone, the value of timber east of the Lake of the Woods, is \$125,000,000. Are they to have no share of that? When the whole of that country was discovered by them—according to the argument—is stamped with their familiar names in all directions, and has been the grave of numbers of their people, and to all this Ontario had never contributed a dollar nor the sacrifice of a single life.

But was there not, it may be asked, an implied undertaking on the part of Ontario towards the other Provinces that they should all share proportionally in the Rupert's Land purchase. We have seen that in the scheme of Confederation, and the clauses providing for the admission of that territory into the Dominion, there was perfect silence as to there being any exclusive rights on the part of Ontario, and that in the purchase of the territory, in the Pacific Railway contracts and expenditure, in all connected with the acquisition and the development of the North-West at the cost of the Confederacy, Ontario has stood in the front as the most prominent actor, having the most influential voice in the Councils which inspired these engagements, and brought into being those properties, as the joint properties, assets and engagements of the Dominion.

It was quite as competent to the arbitrators to have awarded White Earth River to be the western boundary of Ontario as a due north line from the angle of the Lake of the Woods, such an award would have been tantamount to a decree of dismemberment of the Dominion, there can be no doubt of that. This leads us naturally to the enquiry whether the Executive Governments of the Dominion, and of the Province, could without due legislative sanction, place the future of Canada in a position of so much peril?

Arbitrations have been frequently resorted to in boundary disputes between independent nations, because there is no alternative. There are no International Judicatures competent to decide such issues, but when we have to decide a municipal boundary dispute, the legal tribunals of the country,—who alone under our Constitution can authoritatively interpret the language of the Statutes—with the right of ultimate appeal to the Privy Council, should have been resorted to as being the only legitimate mode of decision. The Parliament of Canada had established a Supreme Court, with special jurisdiction over just such disputes as this, and the Legislature of Ontario had assented and indeed agreed by an Act (without which the Supreme Court could have had no jurisdiction in cases affecting that Province), to that Court holding jurisdiction in all controversies between the Province and the Dominion, or between the Province and any other Province of the Dominion. The two Legislative bodies had thus established their tribunal, and it was not competent for the Executive Governments acting alone to select any other. They could not by virtue of mere Orders in Council, which are not laws, oust the Supreme Court of that jurisdiction which the laws of both Legislatures had conferred upon it.

It has become the fashion to treat the Dominion and the Province as if they stood towards each other in this matter, as Independent Sovereign States, with power, as it were, through their respective Executive Governments to make binding treaties (such as this reference to arbitration). This is entirely wrong, each government holds only the special powers delegated to it by the B. N. A. Act of 1867. The Local Governments and Legislatures have no control over Provincial boundaries. They have only, under the amending B. N. A. Act of 1871, an assenting power to legislation by the Dominion Parliament, when an alteration of an acknowledged existing boundary is desired; but no such power is given in regard to the establishment of a disputed boundary, and it should be remembered that the dispute as to the western boundary of Ontario depends upon an Imperial Statute, which is beyond the power of any Canadian Legislature, either directly or indirectly, to alter. There is no power given to either the Dominion Parliament or the Provincial Legislature to deal with such a case. The Crown, by virtue of its prerogative, has original jurisdiction over the boundaries of its possessions; until the Imperial Parliament shall have assumed and exercised jurisdiction in any particular case, when the exclusive power

of the Crown ceases for the future. Thus when Parliament, by the Quebec Act (1774), established the western boundary of the Province, it was no longer competent to the Crown, acting alone, to change that boundary, nor could the Crown define what is the true interpretation of that boundary; that can only be authoritatively and finally done by judicial decision, or by another Act of the Imperial Parliament declaratory of the former.

Chief Justice Draper, when in England in 1857, pressed upon the Imperial authorities the reference of this disputed boundary to the Judicial Committee of the Privy Council. He says in his report to the Governor General: "On such a reference I presume the Judicial Committee would simply make a report and not pronounce a judgment upon which report Her Majesty might issue an Order in Council establishing the boundaries in virtue of her prerogative Royal. Such a declaration would, I venture to submit, meet with respect and obedience in all Her Majesty's Courts of Justice, but if there was a shadow of doubt of the full authority of such an Order, a declaratory Act of Parliament founded upon it or upon the report of the Judicial Committee would set the question at rest for ever." The Colonial Minister approved of Chief Justice Draper's suggestion, provided the Hudson's Bay Company as well as the Government of Canada would agree thereto, and upon being communicated with the Hudson's Bay Company formally signified their assent to the proposed reference of the question, but the Government of the Province did not then see fit to accede to the proposition, and so the suggestion fell through.

In 1872, the Dominion Government proposed to the Government of Ontario a similar reference of the dispute, but this was not accepted. We have seen, however, by the action of the House of Commons during the recent session, that this mode of obtaining a judicial determination of the vexed question is again repeated: the answer of the Provincial Government has yet to be ascertained. But we may say, by way of conclusion, that this dispute has now assumed such proportions that none other than a judicial decision by the last and highest Court of resort, either through the means of a direct reference of the question, or by way of appeal from the decision of our own Courts, can, or indeed ought to be acceptable to the fair-minded men of the Dominion. Any other mode of adjustment would leave grave doubts behind, which would shake confidence in the impartial administration of public affairs, while the decision of the Judicial Committee of the Privy Council, composed of eminent English Judges who are far removed from even a suspicion of sectional leaning, would, in the language of the late Chief Justice be "accepted by all with respectful obedience."

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